

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JAMES L. YOUNG</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 205,123
<b>BAKER DRYWALL</b>	)	
Respondent	)	
AND	)	
	)	
<b>FIREMAN'S FUND INSURANCE</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appealed a preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes on February 21, 1997.

**ISSUES**

Respondent requested Appeals Board review of the following issues:

- (1) Whether the claimant suffered an accidental injury that arose out of and in the course of his employment with the respondent.
- (2) Whether the claimant gave the respondent timely notice of accident.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

(1) Claimant testified at the preliminary hearing held before the Administrative Law Judge on February 20, 1997, that he had physical problems with his right arm, neck, leg, and low back while he worked for the respondent. Claimant alleged a date of accident of repetitive trauma beginning on July 19, 1995, and continuing through his last day of work of August 15, 1995. However, claimant testified his back became symptomatic as he was removing some plywood only on two separate dates, July 19, 1995, and August 15, 1995. Claimant did not testify that his work activities each and every day between July 19, 1995, and August 15, 1995, made his symptoms worse.

Claimant testified he notified his employer of his injuries on both July 19, 1995, and August 15, 1995. Claimant also testified his employer, after he notified him on July 19, 1995, sent him to the Minor Emergency Center for medical treatment in Wichita, Kansas. However, claimant offered no medical records from the Minor Emergency Center to verify that medical treatment.

The only medical evidence admitted at the preliminary hearing, by the claimant, was a report from Pedro Murati, M.D., that contained the results of an independent medical evaluation and recommendations of Dr. Murati from an examination of claimant he conducted on September 9, 1996. The Appeals Board finds it is very significant that claimant had not sought any medical treatment for his injuries that he alleged occurred in July and August 1995, until the examination made by Dr. Murati on September 9, 1996. Dr. Murati diagnosed claimant with a shoulder strain, cervical strain with possible radiculopathy, lumbosacral strain, and probable right "UCS".

Claimant related a history to Dr. Murati of two work-related accidents, one taking place on July 19, 1995, and one taking place on August 15, 1995, while he was taking a plywood floor out. The history also contained a statement from the claimant that he had not worked for approximately one year. Dr. Murati's report recommended diagnostic testing, physical therapy, and medication. However, the report does not contain an opinion by Dr. Murati that claimant's current symptoms were causally connected to his work activities he performed for the respondent more than one year before this examination.

Claimant testified on direct examination he had not worked, except for odd jobs he performed for himself, since he last worked for the respondent in August 1995. However, on cross-examination, claimant admitted he had worked for a number of contractors performing work as a drywall finisher, the same work he performed for the respondent. Claimant acknowledged that as late as a week before the preliminary hearing, he had worked as a drywall finisher for a contractor. Claimant also testified he had drawn unemployment benefits after working for the respondent. Claimant clarified that because of his injuries, the work that he had performed after working for the respondent, was light work of taping and bedding instead of the heavy work of hanging the sheetrock.

John A. Baker, the respondent's owner, also testified in person before the Administrative Law Judge. Mr. Baker denied claimant had notified him of injuries suffered at work on either July 19, 1995, or August 15, 1995. Mr. Baker also denied he had referred

claimant to the Minor Emergency Center for treatment following the July 19, 1995, accident. Although, Mr. Baker also testified that his son could have known about claimant's injuries and his son could have sent claimant for medical treatment. However, claimant testified that Mr. Baker knew of the injuries and sent him for medical treatment and not Mr. Baker's son. The claimant admitted into evidence at the preliminary hearing an accident report which he testified was filled out by his wife. Mr. Baker was questioned about the accident report and indicated that his son or his son's wife filled out the accident report which described an accident that occurred on July 19, 1995.

Mr. Baker further established he knew after claimant had quit working for the respondent that claimant was working for another construction company, his competitor, McFadden Construction Company. Furthermore, Mr. Baker testified that on several occasions he had conversations with Mr. McFadden, the owner of the competitor construction company, and Mr. McFadden had told him that the claimant was performing the heavy work of hanging sheetrock which also required him to work overhead. As previously noted, claimant testified he was only able to perform the light work of taping and bedding and could not hang the heavy sheetrock because of his injuries.

The Administrative Law Judge noted claimant was a poor historian but nevertheless, found claimant was injured at work and he timely reported the injuries to the respondent. She granted claimant's request for medical treatment, authorizing treatment with Dr. Pedro Murati.

The Appeals Board is mindful the Administrative Law Judge had the opportunity to personally observe both of the witnesses that testified in this case. Therefore, she was in the best position to assess their credibility. When there is conflicting testimony, the Appeals Board generally gives some deference to the administrative law judges' decision because the administrative law judge personally observed the witnesses. Nevertheless, in this case and at this particular stage of the proceedings, the Appeals Board finds that claimant has failed to present sufficient credible evidence to meet his burden to establish his present complaints are causally related to the work activities he performed while employed by the respondent in July and August 1995. Claimant falsely testified under oath and also gave Dr. Murati the false history that he had not worked for over a year. Dr. Murati's medical report does not express an opinion as to the cause of claimant's complaints. Finally, although Mr. Baker's testimony was equivocal, he did establish claimant was working during the period claimant said he was unable to work. Also, Mr. Baker established that claimant worked and hung heavy sheetrock which claimant testified he was unable to perform because of his injuries.

(2) The notice issue will not be addressed by the Appeals Board as it is rendered moot by the above finding.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes dated

February 21, 1997, should be, and is hereby, reversed and claimant is denied the requested preliminary hearing benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1997.

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BOARD MEMBER

c: Dale V. Slape, Wichita, KS  
Richard A. Boeckman, Great Bend, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director